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TESTIMONY OF WITNESS, SINCE DECEASED, ON FORMER TRIAL OF CRIMINAL CASE.

In the August number of the REGISTER, reference is made in an editorial to the ruling in the Montgomery case, and forecasting the possibility of that decision operating harshly, and no doubt disastrously, to the accused in a case now pending in the Virginia courts.

In our opinion, no question upon the law of the evidence can be of more importance than this, involving as it does the life and liberty of persons having no other means of proving their innocence than by testimony from lips closed in death.

The first time this question came before our courts was in Caton *v.* Lenox, 5 Rand. 31. This was an action on the case brought on a promissory note. At the second trial, a juryman on the former trial was examined as a witness to prove what a witness had deposed at the first trial, the witness having died since the first trial. The defendants objected to the evidence because the witness testified merely to the substance of what the witness swore on the former trial. The admissibility of the testimony was not even questioned, and the court in deciding the other proposition, namely, that it is sufficient if the witness produced can remember and testify to the substance of the evidence given on the former trial, and that it is not necessary to give the identical words used by the deceased witness, cited and reviewed the English cases admitting this testimony, several of which were criminal cases in which the witness on the former trial had died, and especially Mayor of Doncaster *v.* Day, 3 Taunt. 262, in this case a new trial was given, and counsel moved for a rule of court, that if any of the witnesses should die, or become unable to attend, their evidence given on the former trial might be read on the next. Mansfield, C. J.: "You do not want a rule of court for that purpose. What a witness since (dead) has sworn upon a trial between the same parties, may, without any order of the court, be given in evidence, either from the judge's

notes, or from notes that have been taken by any other person, who will swear to their accuracy; or the former evidence may be proved by any other person who will swear, from his memory, to its having been given."

Then came Finn's Case, reported in the same volume of Randolph's reports as Caton *v.* Lenox, and this is the case which the court followed in Montgomery *v.* Com., and which is supposed to settle the question in Virginia. The plaintiff in error in Finn's case was indicted for feloniously passing a counterfeit bank note, purporting to be a note of the Bank of the United States. The attorney for the commonwealth, in order to prove a confession of the prisoner, offered to prove by another witness what the witness to whom the alleged confession was made had testified before the "Called Court," having first proved that such witness, though living, was beyond the jurisdiction of the court; the court admitted this testimony over the prisoner's objection. It was the unanimous opinion of the supreme court, speaking through Judge Brockenbrough, that this was error. It was said:

"In a civil action, if a witness who has been examined in a former trial between the same parties, and on the same issue, is since dead, what he swore to on the former trial, may be given in evidence, for the evidence was given on oath; and the party had an opportunity of cross-examining him. Peake, 60; Phillips, 199. But we cannot find that the rule has ever been allowed in a criminal case; indeed, it is said to be expressly otherwise. Peake, 60, quoting Fenwicke's Case, 4 St. Trials. Nor can we find that the rule in civil cases extends to the admission of the evidence formerly given by a witness who has removed beyond the jurisdiction of the country; much less can it be admitted in a criminal case."

This is obiter as to a civil case, and obiter as to the proposition that if a witness be dead, his testimony on a former trial cannot be given in evidence, as the witness in Finn's case was not dead but beyond the jurisdiction of the court. That eminent jurist, Judge Brockenbrough, after commenting on the important character of this question, dismisses it with these words: "We cannot find that the rule has ever been allowed in a criminal case," and cites Peake, 60, quoting Fenwicke's Case, 4 St. Trials. We have been unable to ascertain whether or not Fenwicke's Case

was ever expressly overruled in England, but however this may be, it is certain that the facts in that case do not sustain the proposition for which it is cited by Peake in his work on Evidence, and which misled the Virginia court in Finn's Case; the case of Sir John Fenwick was a proceeding in parliament in 1696 by bill of attainder upon a charge of high treason. It appeared that Lady Fenwick had *spirited away* a material witness, who had sworn against one Cook on his trial for the same treason. His testimony having been ruled out, obviously because it was not the case of a deceased witness, nor one where there had been an opportunity for cross-examination on a former trial between the same parties; the case is nevertheless cited by Peake in his work on Evidence as authority for the proposition that the testimony of a deceased witness cannot be used in a criminal prosecution. At any rate that case is no longer law in that country, the rule in England is just the other way; in Rex *v.* Joliffe, 4 Term Rep. 285, and many others cited by the court in Caton *v.* Lenox (but to which Virginia case there is no reference made in Finn's Case), it was held, that in criminal cases the death of a witness is sufficient ground for admitting testimony given by him on a former trial. Brogy's Case, 10 Gratt. 722, cannot be taken as a reaffirmance of Finn's Case, because the absent witness in that case as in Finn's Case was one that had left the commonwealth before the second trial. It is unfortunate that the court in Brogy's Case did not refuse to express any opinion as to the admissibility of the testimony of a deceased witness, as was done by Judge Anderson who delivered the opinion of the court in Crite *v.* Com., 1 Va. Dec. 423, for in that case, as in the other two, the witness was absent from the commonwealth and the action of the trial court in refusing to admit this testimony, was affirmed on appeal. The court said:

"We feel that it would be a work of supererogation in us, to inquire into the correctness of the principles upon which that rule was originally founded. If any change is made, it should be by legislation, and not by judicial decision."

In Carrico *v.* West Virginia Central, etc., R. Co., 39 W. Va. 86, 19 S. E. 571, 24 L. R. A. 50, which was an action brought to recover damages for personal injuries alleged to have resulted from the defendant's negligence, the court in deciding that the

evidence of a witness on a former trial of a civil case, who has since died, may be proven on a subsequent trial of the case, said: "It seems clear that the law allows evidence to prove the evidence on a former trial of a witness since deceased. 1 Green. Ev., § 163; Rice, Crim. Ev., § 224. But this is said not to be sustained by decisions in Virginia or West Virginia. In Finn's Case, 5 Rand. (Va.) 701, it is asserted that such evidence is admissible in civil cases, but not in a criminal case. This was obiter as to a civil case, as the case was a criminal case, and perhaps obiter as to a criminal case as to a dead witness, as the witness was one out of the state. In Brogy's Case, 10 Gratt. 733, that case is recognized as deciding that such evidence is not admissible in criminal cases, and evidence of what a witness for the prisoner said on a former trial, though offered by the prisoner, was rejected. How far these cases settle the question as to the admissibility of evidence of a deceased witness on a former trial is immaterial here. Though not binding, I think the opinion of Judge Brockenbrough in Finn's Case, that in civil cases the evidence of such deceased witness is admissible, is clearly good law, harmonizing with the vast volume of authority elsewhere. It has been so held in Lee *v.* Hill, 87 Va. 497. The only serious question here is as to the mode of proof in this case."

In Mattox *v.* U. S., 15 Sup. Ct. Rep. 337, the rule that the evidence of a witness given on a former trial, who has since died, may be proven on a subsequent trial of the case, was laid down in regard to criminal cases, and in commenting on Finn's Case and Brogy's Case, at page 339, it is said: "As to the practice in this country, we know of none of the states in which such testimony is now held to be inadmissible. In the cases of Finn *v.* Com., 5 Rand. (Va.) 701; Mendum *v.* Com., 6 Rand. (Va.) 704, and Brogy *v.* Com., 10 Gratt. 722, the witnesses who had testified on the former trial were not dead, but were out of the state, and the testimony was held by the court of appeals of Virginia to be inadmissible, though the argument of the court indicated that the result would have been the same if they had been dead."

In Crite *v.* Com., 1 Va. Dec. 426, which was a trial for murder, the first error assigned by the prisoner was, in refusing to allow the testimony of Maria Gwyn, taken before the coroner, to be read upon the trial. Maria Gwyn had removed, after her testi-

mony had been taken by the coroner, from the state of Virginia, where the homicide was committed, and was beyond the process and jurisdiction of the court. She had not been recognized by the coroner to appear as a witness to testify on the trial, and though it appears that efforts were made by the prisoner through his counsel to procure her voluntary attendance, she was not present at the trial, and the prisoner, by his counsel, offered to read her testimony, as taken by the coroner, to the jury; which was objected to by the commonwealth's counsel, and was not admitted by the court. To which ruling of the court, the prisoner by his counsel excepted. The opinion of the court is as follows: "It is said by an eminent author (Taylor on Evidence, 1 vol., § 472) that 'no case need be cited to establish what is admitted on all hands, that if the witness be proved to be dead, secondary evidence of his statement on oath in a former trial between the same parties, will be received as of course.' And that the ground of admitting secondary evidence in civil proceedings seems equally clear, when it is proved that the witness is actually residing in some place beyond the jurisdiction of the court, § 473. But the same writer says, § 474, in criminal proceedings, a similar latitude is not allowable at common law, and the deposition of a witness, whether taken before a magistrate or a coroner, will not be rendered admissible, on mere proof that the witness himself cannot be found after diligent search. Neither will it be received, upon satisfactory proof, that the witness being a foreigner, had, since the prisoner was committed for trial, returned to his own country, and was at the time of the trial resident abroad. Also, he says, this kind of evidence has been rejected in America, both where the witness could not be found within the jurisdiction, but was reported to have gone to an adjoining state, and where he was proved to have left the state, after being summoned to attend the trial. And he cites Wilbur *v.* Selden, 6 Cowen 162, and Finn's case, 5 Rand. 701. If a witness who testified in a civil action has since died, evidence of what he testified is admissible in a subsequent trial of the same case, is a rule which universally prevails. And if he be still living, but has removed from the country, and is beyond the jurisdiction of the court, the current of modern authorities hold that such evidence is admissible in a civil action. Whether, if a

witness be dead, his testimony on a former trial would be admissible in criminal proceeding, is a question which does not arise in this case, and upon which we express no opinion. Some of the American states hold, that if the witness be living, and is beyond the jurisdiction of the court, his testimony on a former trial, in a criminal proceeding may be received. But a different rule has prevailed in this state. In Finn's case, 5 Rand. 701, the question was decided by the general court, as far back as the year 1827; and it was held, that in a criminal prosecution, evidence of what was testified by a witness before the called court, was not admissible on the trial, upon the ground of the absence of the witness, and his removal beyond the jurisdiction of the court. It is true that the general court also held, that evidence of what he testified, was not admissible upon another ground which has been urged by the commonwealth as ground for its admission. The question as to the admissibility of the evidence, upon the ground that the witness had removed from the commonwealth, and was beyond the jurisdiction of the court, was treated as a question raised by the bill of exceptions, and one of graver and more important character than the other. The question was directly raised by the bill of exceptions, necessarily to be decided by the appellate court, in the affirmance or reversal of the judgment of the court below. Twenty-six years afterwards the same question was raised in Brogy's case, and decided by this court (10 Gratt. 722, 732), and the decision in Finn's case was reviewed and reaffirmed. Judge Allen, in whose opinion, on this point, all the judges concurred, remarked that 'this decision has never been controverted in Virginia. The whole criminal code has since undergone a revision, but the rule in Finn's case has been acquiesced in, both by the courts and the legislature. I do not think it necessary, therefore (he says), to go into the inquiry whether the rule was originally founded on proper principles or not. The rule has been established and recognized, and, I think, should be adhered to.' Twenty-eight years have elapsed since that decision was made, and more than a half century since the decision which it reiterated. In the meantime, our criminal law has undergone another revision, and the rule established by those cases has been acquiesced in. We feel that it would be a work of supererogation in us, to inquire into the correctness of the

principles upon which that rule was originally founded. If any change is made, it should be by legislation, and not by judicial decision. If it were an original question, we think there would be great objection to the admission of testimony which had been taken by the coroner, under circumstances which do not give assurance that it is a full and accurate disclosure of the facts known to the witness, and as they would have been disclosed by her, if she had been examined by the counsel for the commonwealth and for the prisoner, before the court, and in the presence of the prisoner, and her testimony had been subjected to the test of cross-examination. It is probable that the effect of her testimony might have been very different. We doubt that such testimony would tend to promote the ends of justice. We think the objection to its admission is far greater than the testimony of a witness taken at the called court, or at a former trial, and in the presence of the prisoner and his counsel, and the counsel of the commonwealth, by whom the witness had been examined and cross-examined. If testimony of this character was admissible for the prisoner, it would be admissible for the commonwealth, and we think it would be an unsafe precedent to establish. For the foregoing reasons, our conclusion is that the first assignment of error is not tenable."

We think that it is abundantly shown from the foregoing that down to the time of Montgomery's case, it was never held in Virginia that the testimony of a witness since deceased, on the former trial of a criminal case, is inadmissible. In that case David Montgomery was indicted in the county court of Rockbridge county for maliciously cutting and wounding William E. Davidson, with intent to maim, disfigure, disable and kill, and was convicted and sentenced to four years' imprisonment in the penitentiary. There were three new trials and each resulted in a conviction. When the case came again before the court on the correctness of an instruction, Judge Phlegar said:

"If the commonwealth shall again put the prisoner on trial, another point made in the petition *may* arise, and therefore we will pass upon it. The court refused to permit the prisoner to prove what was testified to by W. E. Davidson on the first trial; Davidson having since died." Montgomery *v.* Com., 99 Va. 833, 37 S. E. 841.

We cannot find from the report of the case as contained in 99

Va. that any such point as the court refers to *was* made in the petition, and the fact that this point is omitted both from the syllabus and opinion in the official report would seem to indicate that the court held the matter open, so to speak, and was itself in doubt.

The main grounds for the rejection of hearsay evidence, namely; the absence of an oath and of an opportunity to cross-examine the person who is the informant of the witness, are wanting here, for the witness has once been sworn and subjected to cross-examination; this was the objection urged in Crite *v.* Com., to the testimony of a witness taken before a coroner. Text writers, in speaking of this rule, characterize it as the old rule, citing Finn's Case and Wilber *v.* Selden, 6 Cowen (N. Y.) 162, to support it. But in New York it has been departed from. See Crary *v.* Sprague, 12 Wend. 41.

In United States *v.* Sterland (U. S. District Court, Western District of Virginia), Brockenbrough, J., following Finn's Case, decided that the testimony of a deceased witness could not be given in evidence on a second trial of a criminal cause to support either the prosecution or defense. This is merely another instance of the disastrous effect of those three lines of dictum uttered eighty years ago, based on an English case that is no longer law in that jurisdiction. (See Reg *v.* Hogan, 8 C. & P. 167, 34 E. C. L. 670.) We cannot find another jurisdiction in which this rule obtains, and as our courts never seem to have decided any such proposition, they are not bound to adhere to the obiter contained in these early cases.